

AMENDMENT 2 UNDER FIRE

Amendment 2/Backers say legal battle just beginning

From A1

his way through hordes of reporters to pick up his copy of the judge's 17-page decision. "We prevailed. That's what matters."

Though they lost this skirmish, Amendment 2's supporters painted the ruling as only the first step in a protracted legal battle they still believe they can win. Bayless, they insisted, gave them what they really wanted: A ruling that gays, unlike women or racial minorities, illegal immigrants or illegitimate children, do not need the blanket protection of the courts.

"For the first time, in a full-blown trial, with the homosexual proponents bringing all the resources available to them on a national basis, did a judge deny them the status they were requesting," said Will Perkins, chairman of Colorado for Family Values, the Colorado Springs group that drafted and campaigned for Amendment 2. "We're very encouraged. As a matter of fact, you might say we're even excited."

The controversial law has been tied up in the courts since soon after it was approved in November 1992 by a solid majority of Colorado voters. Bayless slapped a temporary injunction on it in January. Then in July, the Colorado Supreme Court upheld his decision — arguing that gays have a fundamental right to participate in the political process like any other group. The high court sent the case back to Bayless for a full hearing. And in October, Bayless presided over a comprehensive trial to examine the private lives and public rights of gays and lesbians.

After hearing testimony from more than 60 nationally known scholars in law, history, science and political theory, it took Bayless more than two months to announce his decision on the law.

Amendment 2 would have prohibited any law that protects gays from discrimination based on their sexual orientation. But for now, Bayless's decision leaves intact anti-discrimination laws in the cities of Denver, Boulder and Aspen. It also leaves other cities, counties and state agencies free to pass similar measures. And it gives gay

rights activists ample ammunition to use in battles in as many as 14 other states considering measures like Amendment 2.

"We rely heavily on the reasoning in *Evans vs. Romer* (the case Bayless decided) because it is thoughtful and recognizes clearly that anti-gay rights measures are unconstitutional," said Suzanne Goldberg, an attorney for Lambda Legal Defense Fund — a New York law firm that specializes in gay rights and had a hand in preparing the case against Amendment 2.

Both sides expect the measure to be reviewed by a higher authority — all but certainly the Colorado Supreme Court and possibly the U.S. Supreme Court.

"We're still about a year or two away from having an ultimate decision in this case," said state Attorney General Gale Norton, whose office put up a vigorous defense of the measure. "It's obviously our intention to appeal this case as quickly as possible. This decision sets the stage very well for us to take it to a higher court. It's a clear decision."

Bayless chose moderation in his relatively short written opinion. He often referred to the trial evidence on which he based his findings. He took care to follow the precedent of higher courts.

Taking the lead of the Colorado Supreme Court, Bayless held the amendment to a higher-than-usual standard. Then one by one, he shot down each of the state's justifications for Amendment 2.

Among other things, state attorneys had argued that the amendment was necessary to protect religious freedom and the privacy of the family. They argued, for example, that without Amendment 2 churches might be forced to condone homosexuality and property owners might be forced to rent to homosexuals.

Though Bayless deemed those legitimate reasons, he decided that Amendment 2 was written too broadly to satisfy them without trampling the rights of gays. "How does Amendment 2," he asked rhetorically, "narrowly promote the goals

of family values? Seemingly, if one wished to promote family values, action would be taken that is pro-family rather than anti some other group."

It wasn't the only time Bayless made a somewhat bemused reference to the rhetoric that has surrounded the controversial issue. Referring to the testimony of Tony Marco, one of the amendment's authors, Bayless wrote: "The court's notes contain his term 'militant gay aggression' no less than six times in his direct testimony alone . . . The evidence presented does not satisfy this court that there is militant gay aggression in this state which endangers the state's political functions."

The state had also argued that the amendment would help it preserve the resources needed to protect other groups from discrimination. But Bayless said the facts didn't support the idea that gays would overwhelm state services now used by minorities and other protected groups. And besides, he said, the cost of services can't be used as an excuse for denying someone equal protection.

But neither did Bayless buy the other side's argument that gays are so vulnerable in society that they need the courts to intervene, once and for all, and protect them from discrimination. The plaintiffs had held out a slim hope that Bayless would grant them that sweeping legal precedent, which would have had a bearing on everything from state-sanctioned marriages to the ban on gays in the military.

To do that, they had to prove gays suffer from a long history of discrimination, lack political power and share a common trait they can't change. Those are the criteria used by the courts to decide if they should intervene and protect a group — such as minorities or women — from discrimination.

But they couldn't sway Bayless — who towed the line of federal courts who've nixed that argument before. While not denying that gays face their share of discrimination in society, Bayless said they have enough political clout to overcome it.

"The president of the United States has taken an active and leading role in support of gays, and an increasing number of states and localities have adopted gay rights protective statutes and ordinances," he noted. "Gays and bisexuals, though small in number, are skilled at building coalitions — which is the key to political power."

The judge wouldn't even touch one of the criteria: whether gays can change their sexual orientation. That, he said, "is a decision for another forum, not this court."

Both sides spent most of their energy debating whether gays fit the criteria traditionally used to grant protection from the courts. That is why state's attorneys, though they lost the case, greeted the decision positively.

"That issue is one we felt we put strong evidence on and we're gratified," said Solicitor General Timothy Tymkovich. "A major part of the trial was focused on that."

But gay rights activists were quick to downplay that portion of the decision. "The court's ruling on that point hardly detracts from the sweetness of our victory," said Goldberg.

Attorneys fighting the amendment made it clear that as the law makes its way through higher courts, they will likely drop the argument altogether.

"The case law is against us," said Jean Dubofsky, lead attorney for the plaintiffs. "That's kind of risky."

Risky because the conservative U.S. Supreme Court has hardly been sympathetic to the gay rights cause. In 1986, a more liberal court refused to strike down sodomy laws as a constitutional violation to the right of privacy. Given that, it's hardly likely the court would, in one swoop, strike down all laws that discriminate against gays. "I don't think we'd even want to have that issue go to the U.S. Supreme Court," one legal scholar said privately. "We'd lose."

Amendment 2 unconstitutional

Denver judge refuses to extend special court protection to gays, lesbians

By **Angela Dlire**
Gazette Telegraph

DENVER — A district judge dealt a carefully aimed blow to Amendment 2 on Tuesday, declaring it unconstitutional while refusing to extend to gays the sweeping protections courts have granted to women and minorities.

The ruling is sure to propel the gay rights debate into a limbo of court appeals, which could end years from now in the U.S. Supreme Court. But it had at least one immediate effect: Gay rights groups called for the suspension of the economic boycott of the state that was provoked by the measure.

In a written ruling, Denver District Judge Jeffrey Bayless said the

amendment tramples the rights of gays to participate in the political process along with any other group. That, he said, was in violation of the 14th Amendment.

But he refused to declare gays a politically vulnerable group in need of the judiciary's powerful hand in their broader fight against discrimination.

Across the state and nation, both sides in the volatile struggle over gay rights claimed the judge's mixed decision as their partial victory.

"It's a great day when a disfavored group can be protected by the courts," attorney Greg Eurich, who argued the case before Bayless for the plaintiffs, said as he fought

See **AMENDMENT2/A5**

WHAT'S NEXT

Attorneys for the state plan to appeal Judge Jeffrey Bayless' decision to the Colorado Supreme Court as soon as possible. But before that, they plan to ask the Denver District Court judge to clarify a few points about his ruling.

Anti-Amendment 2 forces say they probably will not appeal portions of the judge's ruling — particularly the part that says gays do not need the courts to intervene and protect them from discrimination by the government.



Bob Jackson/Gazette Telegraph

